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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/731,342	12/06/2000	Benjamin Wiegand	JBP-529	9185

7590

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EXAMINER
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YU, GINA C

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 01/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/731,342

Applicant(s)

WIEGAND ET AL.

Examiner

Gina C. Yu

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 19 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 2-9, 11-15 and 18-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2-9, 11-15, 18-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)             | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)    | Paper No(s)/Mail Date. _____  |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                                    |

### **DETAILED ACTION**

Receipt is acknowledged of amendment filed on October 19, 2005. Claims are 2-9,11-15 and 18-33 are pending. Claim rejection made under 35 U.S.C. § 102 (b) in view of Dawson et al. (US 4772427) as indicated in the same Office action is withdrawn in view of claim amendment. Claim rejection made under 35 U.S.C. § 102 (b) in view of Flick (Cosmetic and Toiletry Formulations) is withdrawn in view of claim amendment. Claim rejection made under 35 U.S.C. § 103 (a) in view of Dawson and Santora et al. (US 6046145) is withdrawn in view of claim amendment. Claim rejection made under 35 U.S.C. § 103 (a) in view of Herman and Damani et al. (US 4514385) is withdrawn and modified in view of claim amendment. New rejections are made to address new claims.

#### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable Damani et al. (US 4514385) in view of Herman (Global Cosmetic, August 1999).**

Damani teaches that a gel acne treatment is well known in the art. Example I shows a gel composition using salicylic acid and benzoyl peroxide. The method of depositing the acne agents onto the skin is an obvious use of the composition. Example II teaches a cleanser formulation comprising 2 % of benzoyl peroxide and 4 % of salicylic acid. See instant claim 15.

Herman discloses that the basic components of a ringing gel formulation are oil, water, a surfactant, and a cosurfactant. See p. 22, 1<sup>st</sup> col., the paragraph bridging cols.1 and 2. See col. 2 penultimate paragraphs where the surfactants are mixtures that read on claims 1(a) and 20 (a). The oil phase reads on claims 1(b) and 20(b).

The reference teaches the general applicability the "ringing gel" for personal care compositions. See p. 22, 1<sup>st</sup> col., 1<sup>st</sup> paragraph and p. 22, 1<sup>st</sup> col., 1<sup>st</sup>.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the composition of Damani by substituting the gel vehicle with the ringing gel composition of Herman as motivated by the reference because Damani teaches the composition in gel, and Herman teaches that ringing gel is used for upscale skin care applications. The skilled artisan would have had a reasonable expectation of successfully producing a similar acne treatment gel composition.

**Claims 4-9, 11-15, 18, 20, 23-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schaeffer et al. (US 5124313) in view of Dawson et al. (US 4772427) ("Dawson") and Merck Index (1976, 9<sup>th</sup> ed.).**

Schaeffer et al. teach methods of treating dermatological conditions including mild acne by preparing and using a therapeutic bath and shower gel comprising 0.2-2.0 % by weight of retinyl palmitate-peptide complex (RPPC) in a composition. See Example 9; abstract. See instant claims 15, 18, 20, and 33. The composition comprises cocoamidopropyl betaine (amphoteric surfactant) and sodium olefin sulfonate (anionic surfactant).

Schaeffer et al. fail to teach ringing gel.

Dawson discloses a topical ringing gel composition comprising sodium lauryl ether sulfate (an anionic surfactant), polyoxyethylene-glycol ether of lanolin alcohol (a nonionic surfactant), isopropyl myristate, and perfume. See Example 1. See instant claim 1. The example formulations in Examples 2-12 contain isopropyl myristate, meeting the oil phase limitation of instant claims 4-6. The formulations also disclose using water to make up 90% of the total weight. See instant claims 11-17. The reference further teaches in col. 8, lines 26 – 36 to add suitable additives which are compatible with the gel and do not adversely affect the gel structure, and recites coloring agents, preservatives, and antiseptic agents. Examples 2-4 are said to be clear, firm, ringing gels with rapid, voluminous foaming properties and good slip properties on the skin.

While Dawson teaches using 2-4 % of isopropyl myristate, the reference fails to teach using 5-40 % by weight of oil phase. The reference also teaches using up to 23 % alkyl ether sulfate surfactant and up to 24 % of ethoxylated fatty alcohol or fatty ester, but fails to meet the claimed 60-95 % weight limitation for the surfactant phase. See instant claim 9.

Generally, difference in concentration will not support patentability unless criticality of the concentration is shown. In this case, the references generally teach the ratio of oil and surfactants to make a ringing gel. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have discovered

the optimum amounts of oil and surfactants that form a ringing gel by routine experimentation.

Merck Index teaches that isopropyl myristate is a liquid of low viscosity. See p. 5069; instant claims 7, 8, 26, and 27. Merck also teaches that isopropyl myristate is used in cosmetic and topical medicinal preparations where good absorption through the skin is desired.

It would have been obvious to one of ordinary skill in the art at the time the present invention was made to modify the Schaeffer's method of treating acne with a therapeutic bath and shower gel by formulating the gel into a ringing gel as motivated by Dawson and Merck index because i) Schaeffer teaches the method of cleansing and delivering anti-acne agent to the skin by applying a shower gel containing a retinoid; and ii) Dawson teaches a clear, firm, ringing gel composition with rapid, voluminous foaming properties and good slip properties on the skin; and iii) Merck Index teaches that isopropyl myristate that is used in Dawson formulation provides good absorption through the skin.

**Claims 2, 3, 21, and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schaeffer, Dawson, and Merck Index as applied to claims 4-9, 11-16, 18, 20, 23-33 as above, and further in view of Rubin et al. (US 4375421).**

While Schaeffer teaches cocoamidopropyl betaine in the therapeutic shower gel formulation, the combined references do not specifically teach using the amphoteric surfactant in making the ringing gel.

Rubin teaches viscous compositions containing up to 25 % of amido betaines, up to 40 % of salts, and up to 4 % of micelle-forming anionic surfactants. The reference teaches that many of the invention compositions are ringing gel types. The reference also teaches a formulation which comprises amido betains, salts, and nonionic surfactants. The reference also teaches that ringing gel compositions comprising amphoteric and anionic surfactants are well known in cosmetic and toiletry art. See col. 2, bridging par.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the composition of the combined references by adding the amphoteric surfactant as motivated by Rubin because i) Schaeffer teaches a anti-acne gel formulation that contains cocoamido betaine; and ii) Rubin teaches that ringing gel compositions comprising amido betains in combination of nonionic and anionic surfactants are well known in cosmetic art. The skilled artisan would have had a reasonable expectation of successfully producing a stable ringing gel which provide cleansing and anti-acne properties.

### ***Response to Arguments***

Applicant's arguments with respect to claims 2-9, 11-15 and 18-33 have been considered but are moot in view of the new ground(s) of rejection in part and not persuasive in part.

Applicants assert that there is no motivation to substitute the aqueous carboxy vinyl polymer gel of Damani et al. with the ringing gel composition taught by Herman. Applicants reason that the anti-acne actives in Damani et al. would be "incompatible in

solution” and require the specific carboxy vinyl polymer gel to be suitable for use. The argument is not well taken, as there is no evidence in the record to suggest that benzoyl peroxide and salicylic acid, the specific anti-acne actives at issue, would function properly only with the carboxy vinyl polymer gel and would not be effective in other topical formulations. Furthermore, there is no evidence of unexpected results in formulating the anti-acne composition of Damani et al. in the form of ringing gel, which were well known in cosmetic art at the time of the present invention.

### ***Conclusion***

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

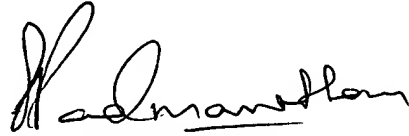


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-0635.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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